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No. 01-1172

In The
Supreme Court of the United States

THE PINEY RUN PRESERVATION ASSOCIATION,

Petitioner,

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reply to Brief in Opposition

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ARGUMENT

Petitioner, The Piney Run Preservation Association, Inc. ("The Association") seeks *certiorari* on three issues raised by the Fourth Circuit's ruling in favor of Respondent, Carroll County ("The County"). The Association will address first the County's argument on these important substantive issues and then the County's attempt to obscure them through rhetoric. The evidence in this case is not in dispute; its legal sufficiency to establish the permit shield defense, the application of which this Court has never addressed, is.

Issue I. The Association presented three arguments in support of *certiorari* on the question of whether, under the Clean Water Act, a discharger is entitled to add a pollutant to the Nation's waters from a point source without first procuring a National Pollutant Discharge Elimination System permit which lists the amount and quantity in which that pollutant may be discharged.

1. *The intercircuit conflict on the question of whether pollutants never listed on a permit may be discharged legally*

The Association presented the intercircuit conflict on this question between The District of Columbia, Third, and Fifth Circuits, which answered the question "no," and the Second and Fourth Circuits, which answered "yes."

The County responded that the District of Columbia, Third, and Fifth Circuit opinions do not stand for the proposition for which the Association cited them. Instead, the County argued, "they hold simply that a National Pollutant Discharge Elimination System (NPDES) permit is required in the first instance before a discharge may discharge any pollutants." (Brief at 9). The County argued further that, "the question before the Fourth Circuit related to the *scope* of the permit." (Brief at 10).

The District of Columbia, Third, and Fifth Circuits cases do stand for the proposition that the Act prohibits the regulatory agency from excluding any pollutant from the requirements of the Act.

For example, in *National Resource Defense Counsel v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977), the plaintiff sought a declaratory judgment that EPA's regulations excluding "minor" polluters from the NPDES program violated the Act. The District of Columbia Circuit Court affirmed the trial court's grant of the declaratory judgment. The court reasoned:

> There are innumerable references in the legislative history to the effect that the Act is founded on the "basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful."

Id. at 1375.

Carroll County incorrectly reads these three cases as not prohibiting the discharge of pollutants in addition to those identified in a NPDES permit. The County is mistaken. The Act does not allow the discharge of any pollutant absent a permit that expressly allows the discharge of that pollutant. If the Act prevents a regulatory agency from excluding a "minor" polluter, *a fortiori* it must prevent the same agency from excluding a particular pollutant from the requirements of the Act. The three cases conflict with the Fourth Circuit's ruling in *Piney Run* and the Second Circuit's ruling in *Atlantic States Legal Foundation v. Kodak,* 12 F.3d 353 (2nd Cir. 1993), *cert.* denied 513 U.S. 811, 115 S.Ct. 62, 130 L.Ed.2d 19 (1994).

2. The conflict with Supreme Court precedent presented by the Fourth Circuit's decision that a NPDES permit allows the discharge of pollutants not identified in the permit

The Association presented the conflict between the Fourth Circuit's ruling and this Court's ruling in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52, 108 S.Ct. 376, 379, 98 L.Ed.2d 306, (1987) and *City of Milwaukee v. Illinois*, 451 U.S. 304, 310-11, 101 S.Ct. 1784, 1789, 68 L.Ed.2d 114 (1981). The *Gwaltney* analysis is similar to the analysis of the District of Columbia, Third and Fifth Circuits: the only way to avoid the Act's total proscription against discharging pollutants into navigable waters of the United States is to discharge a pollutant in accordance with the limitations and conditions expressly set forth in the discharger's NPDES permit.

The Fourth Circuit's ruling that the Act's permit shield provision in 33 U.S.C. §1342(k) licenses the discharge of a pollutant where the discharger "adequately disclosed" and the regulatory agency "reasonably contemplated" the discharge of that pollutant also conflicts with *E.I. du Pont de Nemours & Co. Train*, 430 U.S. 112, 138 n.28, 97 S.Ct. 965, 980 n.28, 51 L.Ed.2d 204 (1977). The permit shield provision means that for the duration of the permit period the discharger will be in compliance with the NPDES permit as long as it only discharges pollutants identified in the permit at levels less than the maximum level set forth in the permit.

3. The important question of federal law presented by the Fourth Circuit's decision that oral agreements between a discharger and a state, without public disclosure, become part of the permit's terms

The Association described how the ruling below presented an important federal question because the Fourth Circuit's ruling violated three fundamental precepts of the Act. First, the Fourth Circuit did not require public disclosure of the nature of the County's pollutants. Second, the Fourth Circuit's reliance on after-the-fact oral testimony by two witnesses who did not work for either Carroll County or MDE when MDE issued the permit violated EPA's internal memorandum requirement that the pollutants must

be "identified *in writing* as present ... during the permit application process...." Third, the Fourth Circuit's endorsement of oral testimony impairs the effectiveness and the efficiency of the NPDES scheme as an enforcement tool. The County made no argument with respect to these three points.

Issue II. The Association presented two arguments in support of *certiorari* on the question of whether the Fourth Circuit properly construed the "permit shield" provision in the Act to license a permit holder to discharge a pollutant in quantities that violate the applicable state water quality standard, when that pollutant is not listed on its NPDES permit.

1. The intercircuit conflict presented by the Fourth Circuit's decision to shield discharges which are illegal under state law and which could not have been listed on the permit

The Association presented the intercircuit conflict on this question between Ninth and Eleventh Circuits, which answered the question "no," and the Fourth Circuit, which answered "yes."

The County acknowledges that the rule in the Ninth and Eleventh Circuit is that "citizens may sue for violations of water quality standards that have been incorporated into a discharger's permit." (Response at p. 11). The County failed to address 40 C.F.R. §122.4, which governed MDE's issuance of the permit. That regulation provides that "No [NPDES] permit may be issued: ...(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."

Respondent attempts to distinguish the Ninth and Eleventh Circuit cases by suggesting that the lower court did not address whether the discharge violated the state water quality standards. (Response at p. 11). However, the lower court ruled that the Respondent violated the Act whenever

the temperature of its discharge violated the water quality standard for heat. App. 35, 43. The Fourth Circuit did not reverse this finding. Instead, that court ruled that the County had the license to discharge this heat because it "adequately disclosed" that it was discharging heat. Contrary to the County's assertion, the effect of these temperatures on the state water quality standard *was* addressed. The Fourth Circuit improperly ruled that the permit shield could be invoked to license a discharge expressly made illegal by the state water quality standard.

2. The conflict with Supreme Court precedent presented by the Fourth Circuit's decision that a NPDES permit allows the discharge of pollutants in violation of the state water quality standards

The Association presented the conflict between the Fourth Circuit's ruling and this Court's rulings in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 224, 48 L. Ed. 2d 578, 96 S. Ct. 2022, 2033 (1976) and *Arkansas, et al. v. Oklahoma, et al,* 503 U.S. 91, 101, 117 L.Ed.2d 239, 251, 112 S. Ct. 1046 (1992).

The County's response to this argument was that the Association "misrepresented" the law. The Association suggests that those cases stand for the proposition that citizens can sue permit holders if citizens can prove a violation of a state water quality standard.

Additionally and contrary to the County's argument, the state water quality standards were incorporated into the County's permit. The County's permit was issued pursuant to 40 C.F.R. §122.4, which provides that "No [NPDES] permit may be issued: …(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." Furthermore, General Condition II. 12 in the County's permit states: "Nothing in this permit shall be construed to … relieve the permittee from any responsibilities, liabilities, or penalties established

pursuant to any applicable State law or regulation under authority of Section 510 of the Clean Water Act of 1977 as amended." Section 510, 33 U.S.C. §1370, preserves Maryland's rights to adopt and enforce its own rules that may be more stringent than the federal standard.

Issue III. The Association seeks *certiorari* on the important federal question of whether a federal court may interpret a state-issued NPDES permit to allow the discharge of pollutant in conflict with both state law and a state appellate court's interpretation of that law.

The County argues that the Association failed to raise this issue below. The County also believes that the evidence was different in the record for the state appellate court decision. Respondent is mistaken on both counts.

The state water quality standard issue has been present in this case since the beginning. Indeed, the trial court accepted the County's suggestion that heat is a pollutant when it exceeds the water quality standard. The Association prevailed in the district court, and the County appealed. An appellee, which prevailed at trial, need not raise on appeal all the reasons for which the trial court was correct.

Second, despite the County's protestations to the contrary, the County cannot and does not direct the Court to any document in the record describing the temperature of the effluent that pre-dates the permit. Nor does the record contain the testimony of any witness who worked for either the County or MDE prior to the date that MDE issued the permit. The documents in the record are dated after MDE issued the permit. The appellate record for the state appellate case was no different.

The Association responds to the County's allegations of "misrepresentations" in the order in which they appear. The Association sets forth in *italics* the County's statements followed by the Association's response.

1. "[The Association] states that the County argued in its Motion for Summary Judgment that it could only be liable for discharges in excess of the water quality standard." (Response at 2)

The County argued unequivocally that the trial court could rule that effluent whose temperature exceeds the water quality standard is a pollutant. The County argued:

> This Court could hold as a matter of statutory construction that the Plant does not discharge "heat" within the context of the list of "statutory pollutants"...in the [Act] unless and until the discharge violates the applicable water quality regulations. *** The obvious alternative, given the water quality effluent limitations provided in the Act and according to state regulation, is that "heat" is not discharged unless the effluent temperature exceeds the temperature criteria applicable to the body of water into which the effluent is discharged – in the case of a Class III stream, the greater of 20°C or ambient. This approach harmonizes all the competing "interests" at work in the case now confronting this Court, and is consistent with the overall scope and approach of the Act as reflected in the water quality related effluent limitations set forth in section 302 of the statute.***The logical result is that "heat" is not discharged unless the water quality regulations are not satisfied.

(County's Memorandum in Further Support of Cross-Motion for Summary Judgment, filed April 23, 1999, appearing in Supplemental Joint Appendix in Fourth Circuit at pp. 31, 38, 39).

2. "[The Association] further misrepresents that the County did not introduce any evidence at trial that it had disclosed its 'addition of heat' to MDE before the 1990

permit was issued. (Pet. at 7) However, the County introduced both documentary and testimonial evidence that the temperature of its effluent was fully disclosed to MDE. The County offered the testimony of a County representative, James Slater, and a MDE representative, James Dieter.... "(Response at 2)

The central issue in this case is whether the testimony as to post-permit disclosures of a pollutant is relevant to whether those discharge are legal. The testimony of James Dieter and James Slater appear in the Fourth Circuit record at J.A. 1213-21; 1338-44. Neither testified that the County informed MDE of this fact during the 1990 application process. The County does not identify any documents to that effect.

MDE issued the permit on March 1, 1990. Mr. Dieter testified that he became an employee of MDE in 1997, seven years after MDE issued the permit. Mr. Dieter testified that he reviewed "the 1990 permit files." When counsel for the County asked Mr. Dieter if he saw "anything in the course of your review related to comments ... based upon the absence of a limitation for a temperature in the permit...," he responded, "no." Mr. Dieter spoke with unnamed MDE staff who informed him that MDE did not regulate heat from domestic wastewater treatment plants because those plants did not intentionally heat the effluent. The record does not disclose when the "unidentified staff" arrived at that erroneous legal conclusion; it was first articulated to the citizens during administrative proceedings in 1995 on the permit modification vacated in *Woodward v. MDE.*

Mr. Slater testified that he became an employee of Carroll County in May 1990, two months after the permit was issued. He testified that the Commissioners disclosed the temperature of the Plant's effluent to MDE for "[a]s long as I have knowledge of it, ... which is back to 1990." He did not testify that the Commissioners provided this information to MDE during the application process. Furthermore, knowledge of the temperature of the effluent does not allow

one to answer the question of whether the Plant is adding heat to the stream. In order to answer this question, one must know the temperature of the receiving water. There is no evidence that the Commissioners communicated to MDE during the application process that the temperature of the effluent was warmer than the temperature of the receiving water, or by what amount. Indeed, Mr. Slater testified he first became aware in 1992 or 1993 that the Plant was discharging heat when the Plaintiff brought it to his attention.

3. "[The Association] misstates that temperature data collected by the County between 1996 and 1998 showed that the County added 'thermal pollution' to the stream on 371 of 397 days measured." (Response at 3)

In *Piney Run I,* the district court reviewed the summary judgment exhibit that contained the 1996-1998 temperature data and stated, "the temperature of the plant effluent has exceeded the upstream temperature on 371 of 397 days." (emphasis supplied)(App. 59). The lower court relied on this data to grant summary judgment against the Respondent. The trial court rejected the Respondent's efforts to impeach its own temperature data, and this Court should, too. Furthermore, there is no evidence to support the County's new argument that the temperature was taken "*in the pipe.*" Finally, Respondent's argument that "on some days" the temperature of the effluent "was one or two degrees higher than the stream temperature at various upstream locations" is only partly correct. (Brief at 3). At some times on some days, the temperature differential was one or two degrees Celsius. However, the record shows that on many days the temperature differential was at least three degrees Celsius. *See* Joint Appendix 251-255. A three degree Celsius differential is a more than a five degree Fahrenheit differential.

4. The Fourth Circuit followed the reasoning of the ... Environmental Protection Agency." (Brief at 14).

The Fourth Circuit accorded *Chevron* deference to EPA's old interpretation of the permit shield defense. EPA promulgated its current interpretation in 1995. (This document appears in the Fourth Circuit record at Addendum pp. 2-3 to the brief of the *amicus* Industry Groups). The 1995 version "[clarifies] that a discharger must provide the information in writing for the permit record in order to obtain the authorization to discharge and the shield provided by a [NPDES] permit." Thus, the pollutants must be identified in writing as present ... during the permit application process and contained in the administrative record which is available to the public." This Court's decision in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984) does not contemplate deference to a position which the agency itself has abandoned. *Christenson v. Harris County,* 120 S. Ct. 1655, 1662 (2000). The Fourth Circuit cited *Atlantic States Legal Foundation v. Kodak* with approval. That court deferred to an old EPA memorandum, 12 F.3d 357, and did so before this Court decided *Christenson.* The Fourth Circuit disregarded the *Christenson* standard when it cited *Atlantic States.*

CONCLUSION

For the reasons stated above, and in its Petition, Petitioner respectfully requests that this Court grant Certiorari in this case.

Respectfully submitted,

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